

efficacious for the relief of all pain, for the relief of colds, and for the relief of discomfort resulting from migraine, earache, neuritis, and rheumatic pains; would act as a restorative on the nervous system after overindulgence; and would produce unexcelled results in quieting racked nerves and upset nervous stomach and all other symptoms that go with the "morning after," were false and misleading since the article would not be efficacious for such purposes. The tablets in the remaining shipment were alleged to be misbranded in that the statements in the labeling that they would stop all pain, would be efficacious in the cure, mitigation, treatment, prevention, or relief of migraine, earache, neuritis, and rheumatic pains, and would be efficacious in the treatment or prevention of prolonged and severe pain and colds, were false and misleading since they would not be efficacious for such purposes. Both lots of tablets were alleged to be misbranded further in that they were fabricated from two or more ingredients and their labeling did not bear the common or usual name of each active ingredient.

On July 17, 1942, a plea of nolo contendere was entered on behalf of the defendant and the court imposed a fine of \$30 on each of the 4 counts but suspended payment on each count but the first, on condition that the defendant not be convicted of subsequent violation of the law.

829. Misbranding of Alberty Food, Instant Alberty Food, Alberty's Vegetable Compound, Alberty's Ca-Mo Pellets, Alberty's Phosphate Pellets, Alberty's Lebara Pellets, Alberty's Laxative Blend, Cheno Herb Tea, Cheno Combination Tablets, and Cheno Preparation of Phytolacca Berry Juice. U. S. v. 12 Packages of Alberty's Food (assorted sizes and various packages of similar products). Tried to the court without a jury. Judgment for the Government. Decree of condemnation and destruction. (F. D. C. No. 3707. Sample Nos. 99902-E to 99908-E incl., 99910-E to 99912-E incl.)

On January 27, 1941, the United States attorney for the District of Columbia filed a libel against 12 packages of Alberty's Food, 18 packages of Instant Alberty Food, 3 packages of Alberty's Vegetable Compound Capsules, 5 packages of Alberty's Ca-Mo Pellets, 10 packages of Alberty's Phosphate Pellets, 8 packages of Alberty's Lebara Pellets, 5 packages of Alberty's Laxative Blend, 30 packages of Cheno Herb Tea, 40 packages of Cheno Combination Tablets, and 5 packages of Cheno Preparation of Phytolacca Berry Juice, at Washington, D. C., alleging that the articles were being offered for sale in the District of Columbia at Vita Health Food Company, Washington, D. C.; and charging that they were misbranded.

Analysis of the Alberty Food showed that it consisted essentially of wheat flour with added calcium phosphate, the total calcium phosphate equaling 6.75 percent.

Analysis of the Instant Alberty Food showed that it consisted mainly of dried, partially skimmed milk, with a little ground cereal and approximately 6 percent added calcium phosphate.

Both products were alleged to be misbranded in that representations in the labeling that they were adequate and appropriate treatments for indigestion, scurvy, rickets, eczema, diseases of malnutrition, nervousness, diarrhea, nausea, stomach irritation and other complications, mental deficiency, stunted physical development, decayed teeth, acidity, common aches, dysfunction of the liver, spleen and pancreas, mucous colitis, "run-down" conditions, depleted nervous system, acidosis, toxic conditions arising from inactive liver, excess bronchial secretions, jaundice, gallstones, gastric hyperacidity, ulcerative conditions, stomach distress, malnutrition, malassimilation, irritated inflamed stomach and anemia; that they would be beneficial to the nerves, the tissues and the vital organs, i. e., liver, heart, and spleen; would relieve severe pain of the stomach and other symptoms of upset digestive tract, aid in the healing of broken legs, increase the red blood cells; would provide strength and health; would cause children to be larger and heavier than children of the same age and not as susceptible to the usual children's diseases; would prevent undernourishment, tooth decay, bodily exhaustion, sagging shoulders, paleness, listless expression in children; were adequate and appropriate treatments of neurotic, backward children by improving mentality, disposition and health; would be effective treatments for infant diarrhea, sore buttocks, irritated stomach and intestines, digestive disturbances, pyloric stenosis and marasmus; would prevent calcium deficiency in pregnant women and their unborn offspring, and prevent after-childbirth run-down condition; would promote the formation of hemoglobin, bone tissue; that they possessed healing, health, youth and energy-giving properties; would cause increase in weight, vitality and strength, clear the skin, and facili-

tate health, long life and youthful appearance; would produce an invigorating effect which would result in strength and stamina, sparkling eyes, pep, clear skin and vigorous health, improving the personal appearance, changing the physique and personality from a negative to a positive type; would make the individual feel strong, feel better physically and produce solid flesh; would revive normal functioning of the body, eliminate the "fixed" toxic poisons, and awaken vital organs and assimilative cells; would increase the peristaltic activities of the sluggish stomach and intestines and normalize digestive juices; would increase assimilation of the calcium element by furnishing materials for increased hemoglobin; would aid in growing strong and good teeth; that they were body-builders, especially in youth; that they would strengthen, rebuild, and facilitate the production of new cells, would prevent physical deterioration, premature old age, ill health and premature death, were false and misleading since the articles would not be efficacious for such purposes.

Analysis of the Alberty's Vegetable Compound Capsules showed that they contained approximately $9\frac{1}{2}$ grains of a mixture of dried vegetables, including tomatoes, beet leaf, spinach, cauliflower and lettuce. Total mineral constituents 1.2 grains per capsule, total calcium (calculated as calcium oxide) 0.12 grain, total phosphorus (calculated as phosphorus pentoxide) 0.01 grain per capsule.

The article was alleged to be misbranded in that certain statements in the labeling, which represented that it would supply mineral elements and nourishment, which would enhance the powers of digestion so that the natural resistance of the body would not be lowered and the starch and sugar intake would be kept at a minimum, and that it would increase strength and energy, were false and misleading since it would not be efficacious for such purposes.

Analysis of the Ca-Mo Pellets showed that they consisted of approximately $\frac{1}{1000}$ grain of calcium phosphate and 1 grain of milk sugar moulded into pellet form.

It was alleged to be misbranded in that representations in the labeling, that it would build up the calcium reserve, offset acidity, sweeten the over-acid stomach, and that it was an adequate and appropriate treatment for eczema, were false and misleading since it would not be efficacious for such purposes.

Analysis of the Alberty's Phosphate Pellets showed that they consisted of minute amounts of iron, potassium, sodium, calcium, and magnesium phosphates moulded into pellet form with milk sugar.

The article was alleged to be misbranded in that representations in the labeling that it was an adequate and appropriate treatment for nervous conditions, nervousness, neurasthenia, nervous debility, weakness, sleeplessness, nervous breakdown and dysfunction of the endocrine glands; that it was a preventive of constipation, loss of stamina, mental and physical exhaustion, loss of memory, sleeplessness, high blood pressure symptoms, loss of energy, despondency, and trembling or aching limbs; that it would promote digestion, absorption and assimilation of food, provide nerve force, induce restful sleep and renew strength and vitality, would promote better digestion and assimilation, and produce a soothing, beneficial effect on the nerve tissues of nervous, high strung, mentally and physically exhausted persons, would improve the force, tone, and vigor of the nervous tissues, and act as a tonic to the blood and the entire body, were false and misleading since the article would not be efficacious for such purposes.

Analysis of the Lebara Pellets showed that they consisted of approximately $\frac{1}{1000}$ grain of anhydrous sodium sulfate and 1 grain of milk sugar moulded into tablet form.

The article was alleged to be misbranded in that representations in the labeling that it would increase the flow of bile, keep the skin and complexion clear, that it was a diuretic, and that it was an adequate and appropriate treatment for biliousness, headache, bad taste in the mouth, coated tongue, spots before the eyes, bearing down pains in the small of the back and constipation of hepatic origin, were false and misleading since the article would not be efficacious for such purposes.

Analysis of the Alberty's Laxative Blend showed that it consisted of a mixture of plant drugs including buchu leaves, uva ursi leaves, sassafras bark, couch grass, elderberry flowers, horsetail, yarrow flowers, fennel seed, marsh-mallow root, senna leaves, aniseed and buckthorn bark.

It was alleged to be misbranded in that representations in the labeling that it was an aid to digestion, a tonic laxative, and would relieve the usual feeling of depletion following evacuation, were false and misleading since it would not be efficacious for such purposes.

Analysis of Cheno Herb Tea showed that it consisted of a mixture of plant drugs, including senna leaves, sassafras bark, licorice root, seaweed, caraway seed, mint leaves, fennel seed, and aniseed.

Analysis of the Cheno Combination Tablets showed that they contained dried okra, Irish moss, dulse, green leafy material, such as parsley, spinach and celery, and 1.7 grains per tablet of calcium phosphate. The total iron content was 0.0004 grain; total iodine 0.0001 grain per tablet.

Analysis of the Cheno Preparation of Phytolacca Berry Juice showed that it consisted of a plant extract such as poke berry juice in a mixture of water, sugar, and alcohol.

The Cheno preparations were alleged to be misbranded in that representations in the labeling that the articles constituted adequate and appropriate treatment for disturbances of nutrition, overweight, underweight, leanness, obesity, stomach disorders, bronchial colds, hypothyroidism with dry skin, lack of perspiration, heart disturbances, constipation, mental sluggishness, slow movement, lack of activity, asthma, hay fever, and sensitiveness to various kinds of food, headache, dizziness, fatigue, drowsiness, sleepiness; that it would be an efficacious treatment for pancreatic, hypo-gonadal, thyroid and pituitary obesity, would improve health, reduce nervousness, provide buoyancy of spirit and freedom from logy oppressiveness, promote firm flesh and soft skin with fine texture, overcome lassitude, prevent and reduce the storage of excess fat, prevent toxemia, regulate the elasticity of the muscles, balance and regulate body functions, speed up metabolism, eliminate accumulated water in cells and tissues, increase energy and vitality and remineralize the body, were false and misleading since the articles would not be efficacious for such purposes.

On April 7, 1941, Ada J. Alberty, Los Angeles, Calif., claimant, having filed a motion that the action be transferred to a district in close proximity to the Southern District of California, an order was entered in the District Court for the District of Columbia transferring the action to the Northern District of California, Southern Division; and ordering that the clerk forward all files and records of the case to that district for trial. The case came on for trial before the court on January 22, 1942, and was continued to January 23. A recess was ordered until February 7, 1942, on which date the trial was resumed and was concluded on February 8, 1942. The court took the case under advisement and on June 29, 1942, handed down a decision for the Government and on October 26, 1942, made the following findings of fact and conclusions of law:

NORCROSS, *District Judge*. "The above-entitled cause having been regularly tried without a jury and having been submitted by the parties hereto; Frank J. Hennessy, Esquire, United States attorney for the Northern District of California, and A. J. Zirpoli, Esquire, assistant United States attorney for said district, appearing as counsel for libelant, and Eldon V. Soper, Esquire, and Francis W. Murphy, Esquire, appearing as counsel for the claimant; and evidence both oral and documentary having been introduced, and the court being fully advised in the premises, now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

"That the allegations of the libel are true.

II.

"That the allegations of paragraph third of the answer of claimant and paragraphs II and IV of the amended answer of claimant are not true.

III.

"That the 'Modified Order to Cease and Desist' entered by the Federal Trade Commission on June 26, 1939, in the matter of 'Adah Alberty, etc., docket number 2875,' pertains to and relates to a matter and matters and things separate and distinct from the proceedings in the instant case and does not involve the articles of drug held and offered for sale in the District of Columbia in the manner recited in the libel herein.

IV.

"That the following articles described in said libel

'12 packages, more or less, of Alberty Food (Assorted sizes),
 18 packages, more or less, of Instant Alberty Food (assorted sizes),
 33 packages, more or less, of Alberty's Vegetable Compound Capsules,
 5 packages, more or less, of Alberty's Ca-Mo Pellets,
 10 packages, more or less, of Alberty's Phosphate Pellets,
 8 packages, more or less, of Alberty's Lebara Pellets,
 5 packages, more or less, of Alberty's Laxative Blend,
 30 packages, more or less, of Cheno Herb Tea,
 40 packages, more or less, of Cheno Combination Tablets, and
 5 packages, more or less, of Cheno Preparation of Phytolacca Berry Juice.'

were being offered for sale in the District of Columbia at the time of the filing of the libel herein.

V.

"That the said articles described in the paragraph immediately above were held in and intended for sale in the District of Columbia at the time and place aforesaid.

VI.

"That the said articles described in paragraph IV of these findings of fact were misbranded at the time of the filing of the libel herein, in the manner following:

"352 (a) in that the statements and designs appearing in the labeling (booklet 'Calcium The Staff of Life'), as set forth in Exhibit 'A', attached to the libel, are false and misleading in that they represent that the articles are efficacious for the purposes recommended, whereas the articles are not efficacious for the purposes recommended; (Alberty Food and Instant Alberty Food)

"352 (a) in that the following statements appearing in the labeling (booklet 'Calcium The Staff of Life') are false and misleading in that they represent that the article is efficacious for the purposes recommended, whereas the article is not efficacious for the purposes recommended: (Alberty's Vegetable Compound Capsules)

'WHEN THE DIET MUST BE STARCH AND SUGAR FREE

'There are times when persons suffering from malfunctions of certain organs are unable to tolerate starch and sugar in the same proportion as the normal individual. Physicians then recommend a diet as free from starch and sugar as it is possible to get and still give the person enough nourishment to maintain the life and health.

'During such dietary regimes it is absolutely necessary to keep the digestive functions working at their best because nature MUST get all the nourishment possible from what food is eaten without in any way increasing the load of sugar or starch.

'ALBERTY VEGETABLE COMPOUND CAPSULES give an easily digestible form of organic minerals. ***ALBERTY FOOD, VEGETABLE COMPOUND CAPSULES AND OXORIN TABLETS, furnish mineral elements, nourishment and enhance the powers of digestion so that the natural resistance of the body is not lowered and the starch and sugar intake is still kept at a minimum.

'Reports of many users of ALBERTY VEGETABLE COMPOUND CAPSULES, OXORIN tablets and ALBERTY FOOD show that they have acquired greater sugar and starch tolerance and an increase in strength and energy.'

"352 (a) in that the following statements appearing in the labeling (booklet 'Calcium The Staff of Life', pp. 42 and 47) are false and misleading in that they represent that the article is efficacious for the purposes recommended, whereas the article is not efficacious for the purposes recommended: (Alberty's Ca-Mo Pellets)

* * * The following formulas comprise ingredients of homeopathic dosage and under those principles are credited with the action described.

'CA-MO helps to build up a calcium reserve. Its calcium content offsets acidity, sweetening the over-acid stomach.

'ECZEMA

'Improper diet is frequently the cause. * * *

'Here is the treatment I have seen used quiet frequently by physicians: Cleanse the affected parts * * *. Pat dry and then anoint with * * * salve * * *. A prescription, identical with which I now call CA-MO PELLETS, was given every two hours during the day. * * *'

"352 (a) in that the statements appearing in the labeling (booklet 'Calcium The Staff of Life'), as set forth in Exhibit 'B,' are false and misleading in that they represent that the article is efficacious for the purposes recommended, whereas the article is not efficacious for the purposes recommended; (Alberty's Phosphate Pellets.)

"352 (a) in that the following statements appearing in the labeling (booklet 'Calcium The Staff of Life,' pp. 42 and 49) are false and misleading in that they represent that the article is efficacious for the purposes recommended, whereas the article is not efficacious for the purposes recommended: (Alberty's Lebara Pellets.)

'The following formulas comprise ingredients of homeopathic dosage and under those principles are credited with the action described. * * *

'ALBERTY LEBRARA PELLETS * * * contain salts which act to increase the flow of bile from the liver * * *. An active liver keeps the skin and complexion clear, there is none of the yellow, bilious look characteristic of the toxic condition resulting from a dormant liver.

'HOW TO HELP THE LIVER

'LEBRARA PELLETS contain a valuable salt which has a definite reaction on the liver and as a diuretic, by increasing the flow of bile. LEBRARA PELLETS act as a bile stimulant in hepatic disturbances characterized as biliousness, headache, bad taste in the mouth, coated tongue, spots before the eyes, bearing down pains in the small of the back and constipation of hepatic origin.'

"352 (a) in that the following statements (booklet 'Calcium The Staff of Life,' p. 52) are false and misleading in that they represent that the article is efficacious for the purposes recommended, whereas the article is not efficacious for the purposes recommended: (Alberty's Laxative Blend.)

'ALBERTY'S LAXATIVE BLEND includes seventeen herbs which, according to botanical books, were one of the best combinations obtainable for a tonic laxative. Herbs are included which have a tonic after-effect, that relieves the usual feeling of depletion following evacuation of the bowels from ordinary artificial laxatives.

'For the temporarily constipated person it acts * * * to * * * aid digestion.'

"352 (a) in that the statement upon a placard accompanying the articles Reduce the Cheno Way. The Five Factor Plan. Safe Scientific is false and misleading in that it represents that the articles are efficacious for the purposes recommended, whereas the articles are not efficacious for the purposes recommended; (Cheno Herb Tea, Cheno Combination Tablets, Cheno Preparation of Phytolacca Berry Juice.)

"352 (a) in that the statements and designs appearing in the labeling (booklet Cheno Plan The 5 Factor Reducing System), as set forth in Exhibit C, attached to the libel, are false and misleading in that they represent that the articles are efficacious for the purposes recommended, whereas the articles are not efficacious for the purposes recommended; (Cheno Herb Tea, Cheno Combination Tablets, Cheno Preparation of Phytolacca Berry Juice.)

VII.

"That the booklets Calcium The Staff of Life and Cheno Plan the 5 Factor Reducing System and the placard Reduce the Cheno Way—The Five Factor Plan, Safe, Scientific accompanied the articles described in paragraph IV hereof at the time and place described in paragraph IV hereof and then and there constituted part of the labeling of the aforesaid articles.

CONCLUSIONS OF LAW

I.

"That the articles described in the libel herein and paragraph IV of the above findings of fact were drugs illegally offered for sale and held and intended for sale within the District of Columbia at the time of the filing of the libel herein, in violation of Section 534 of Title 21 USCA, for the reason that said articles were at said time and place misbranded within the provisions of Section 352 (a) of Title 21 USCA.

II.

"That the booklets Calcium The Staff of Life and Cheno Plan the 5 Factor Reducing System and the placard Reduce the Cheno Way. The Five Factor Plan. Safe. Scientific accompanied the articles described in paragraph IV of the above findings of fact at the time and place described in paragraph IV of the above findings of fact and then and there constituted part of the labeling of the aforesaid articles.

III.

"That the Modified Order to Cease and Desist entered by the Federal Trade Commission on June 26, 1939, in the matter of Adah Alberty, etc., Docket No. 2875, is not res judicata to the matters and things alleged in the libel herein and does not estop the libelant herein to allege, assert or maintain that the matters and things in the libel herein constitute labeling within the provisions of 21 USC 352 (a) and does not estop libelant to allege, assert or maintain that the matters and things in the libel herein, alleged to consist of booklets and placards, accompanied the articles in said libel specifically described.

IV.

"That the above-mentioned articles of drugs described in paragraph IV of the findings of fact above, be, and they are hereby, condemned and forfeited to the United States, to be by the United States of America destroyed forthwith.

On October 26, 1942, judgment of condemnation was entered and it was ordered that the product be destroyed and that the clerk of court return the file and record and copy of the decree of condemnation and destruction to the clerk of the United States Court for the District of Columbia, with directions that a certified copy of the decree be furnished the marshal.

On November 7, 1942, the claimant filed a motion for a new trial, which motion was denied by the court February 13, 1943, without opinion.

830. Misbranding of Ecco Hygienic Powder. U. S. v. 501 Bottles of Ecco Hygienic Powder. Default decree of condemnation and destruction. (F. D. C. No. 7638. Sample No. 80612-E.)

On June 15, 1942, the United States attorney for the Southern District of Ohio filed a libel against 501 bottles of the above-named product at Dayton, Ohio, which had been shipped on or about April 13, 1942, alleging that the article had been shipped in interstate commerce by the Eby Chemical Co. from Harrisburg, Pa.

Analysis showed that the article consisted essentially of boric acid and alum together with small quantities of oxyquinoline sulfate, menthol, thymol, phenol, eucalyptol, salicylic acid, and methyl salicylate. Bacteriological tests showed that it was not germicidal in the dilution recommended for use.

The article was alleged to be misbranded: (1) In that the statements in the labeling which represented and suggested that it was a reliable contraceptive, that it was an appropriate treatment for head colds, rhinitis, rectal irritations, bleeding gums, trench mouth, sore throat, tonsillitis, quinsy, laryngitis, sinusitis, pyorrhea, chickenpox, congestion, measles, infected wounds, abscesses, boils, hemorrhoids, vaginal burns, leucorrhea, vaginitis, and gonorrhea; and that it was an adequate treatment for such skin conditions as dandruff, itchy scalp, sores, impetigo, hives, corns, callouses, bunions, acne, blackheads, bed sores, barber's itch, cold sores, eczema, fever blisters, frost bite, chilblains, poison ivy, skin rash and sunburn, were false and misleading since it would not be efficacious for such purposes; (2) in that the following statements on the label, "Ecco Powder is a concentrated inhibitory antiseptic, efficient and economical. Always use fresh solutions properly diluted with hot or boiling water * * * When possible use wet dressing or cover affected parts with clean sterile bandage or gauze after dusting with Ecco Powder" were misleading since they failed to reveal the material fact that it was not antiseptic except when used as a wet dressing or with a bandage that would permit prolonged contact with the body.

On July 16, 1942, no claimant having appeared, judgment of condemnation was entered and the product was ordered destroyed.